

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 28, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP1682

Cir. Ct. No. 2012FA234

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

MELISSA M. VANDE VOORT,

PETITIONER-APPELLANT,

V.

SCOTT J. VANDE VOORT,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Brown County:
THOMAS J. WALSH, Judge. *Affirmed in part; reversed in part and cause
remanded for further proceedings.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Melissa Vande Voort appeals her divorce judgment. She argues the circuit court erroneously denied her request for a continuance. She also challenges the court’s custody and placement, property division, and maintenance decisions. We affirm on these issues. However, we agree with Melissa that the circuit court erroneously exercised its discretion¹ on the issue of attorney fees and remand for further proceedings on that issue.

¶2 Melissa and Scott Vande Voort were married in 1999 and divorced in 2013. Two minor children were born of the marriage and Scott adopted another child born to Melissa prior to the marriage. On November 19, 2012, Melissa began serving a one-year conditional jail sentence and was still in custody on the date of the final hearing.

¶3 On April 24, 2013, the court received correspondence from Melissa requesting an adjournment. The court took that request under advisement at the beginning of the final hearing on April 26. The court then proceeded with the issues of custody and placement. The guardian ad litem recommended that sole legal custody and primary placement be awarded to Scott. After an off-the-record discussion, the parties stipulated Scott would be awarded sole custody and primary placement, with secondary placement to Melissa upon reasonable notice. The parties also reached an agreement on the issues of property division, child support and maintenance. Maintenance was held open for eighteen months, and no child support was ordered. By separate written judgment, the court also found Melissa’s

¹ Both parties use the phrase “abuse of discretion.” We have not used that phrase since 1992, when our supreme court replaced that phrase with “erroneous exercise of discretion.” *See, e.g., Shirk v. Bowling, Inc.*, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375.

former attorney was entitled to \$45,822 for attorney fees and disbursements. Melissa now appeals.

¶4 The issues in this appeal rest within the discretion of the circuit court. *See, e.g., LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We will sustain a discretionary decision if the court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). Findings of fact will be affirmed unless clearly erroneous. WIS. STAT. § 805.17(2).²

¶5 Melissa argues the circuit court “committed several reversible errors when it failed to grant Melissa’s request for a continuance.” She insists the court was obligated to adjourn the final hearing to allow her additional time to “find an attorney or properly prepare to represent herself.”

¶6 Court minutes from March 6, 2013, indicate Melissa did not wish her attorney to continue on the case, but the court declined to allow her attorney to withdraw at that time. Another hearing was scheduled for March 15, 2013. The court minutes from the March 15 hearing indicate Melissa requested more time to find an attorney. The court stated it would “sign withdrawal of [Melissa’s attorney] in 7 days from today’s date.” A “Stipulation and Order to Withdraw as Attorney” was filed on March 27, 2013.

¶7 At the final hearing a month later, Melissa appeared pro se, and the circuit court heard and took under advisement her request for adjournment. The

² References to the Wisconsin Statutes are to the 2011-12 version.

court then went off the record to allow the parties to review documents relating to a proposal for custody and placement. The court then went back on the record and recited the agreement reached by the parties regarding custody and placement. The parties confirmed under oath their agreement and their belief that the agreement was in the children's best interest, and the court adopted the agreement.

¶8 The circuit court then went off the record and the parties discussed the remaining issues in the divorce. The court then recited on the record the parties' agreement, and the following colloquy occurred:

[The Court]: Now, you were in court when I read into the record the entire agreement in this case; is that correct?

[Melissa]: Yes.

[The Court]: Did you understand all of those agreements?

[Melissa]: Yes.

[The Court]: And you understand that if I accept that agreement to resolve this case, that there will be no more litigating those issues, it's done. Do you understand that?

[Melissa]: Absolutely.

[The Court]: And you want me to do that?

[Melissa]: Yes.

[The Court]: Do you have any questions about the agreement that you reached here today?

[Melissa]: No, I don't.

[The Court]: And, again, I asked your husband the same question, and I know it came out hard, and I imagine it's going to come out hard for you, too. But under all the circumstances as they exist, I know a lot of compromises were made, but under all the circumstances as they exist, do you believe the agreement is roughly fair and equitable?

[Melissa]: Yes.

¶9 Under these circumstances, where Melissa participated in a procedure confirming her agreement resolving the issues in her divorce, she will not be heard to complain the circuit court erroneously exercised its discretion by failing to grant a prior request for a continuance. In addition, before approving the stipulations, the court was familiar with the parties' circumstances, heard each stipulation explained, questioned the parties on their own understanding of the agreements, and made its own determination based on proper statutory factors that the agreements were fair, equitable and in the children's best interests. We conclude the court properly exercised its discretion and, accordingly, we affirm on the issues of custody and placement, property division and maintenance.

¶10 However, our review of the record does not allow us to sustain the circuit court's award of attorney fees to Melissa's former attorney. Scott contends the issue was waived because Melissa did not raise the reasonableness of the fees in the circuit court. We are not persuaded. The record is insufficient to avoid remanding the case for further findings as to the reasonableness of the fees.

¶11 Significantly, Scott fails to provide citation to the record on appeal supporting a conclusion that Melissa was aware that her former attorney had moved for a judgment for fees totaling over \$45,000, or that she had an opportunity to address the court on this issue. The record also fails to indicate any supporting documentation filed by the attorney, such as prior billing statements to Melissa that would show a breakdown of the work performed and the hourly rate. Similarly, there is no indication in the record that the court conducted an inquiry into the reasonableness of the fees. We therefore reverse on the issue of attorney fees and remand for further proceedings concerning the reasonableness of the fee request.

¶12 We also deny Scott's motion for attorney fees and costs on appeal. Contrary to Scott's insistence, we cannot conclude the appeal was filed by Melissa and continued for an improper purpose such as to harass and prolong the litigation.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

